FORM A
FILING SHEET FOR EASTERN CAPE HIGH COURT, GRAHAMSTOWN
JUDGMENT

PARTIES**:**
BLUE CRANE ROUTE MUNICIPALITY **PLAINTIFF**

and

DARREN OWEN CLAASEN **FIRST DEFENDANT**
DAVY LOUW **SECOND DEFENDANT**
ADVOCATE SHAHEED PATEL **THIRD DEFENDANT**
GEORGE WILLIAM GOOSEN **FOURTH RESPONDENT**

- Registrar: **CASE NO: 104/06**
- Magistrate:
- High Court: **EASTERN CAPE HIGH COURT, GRAHAMSTOWN**

DATE HEARD: **19/2/09**
DATE DELIVERED: **2/4/09**

JUDGE(S): **Plasket J**

LEGAL REPRESENTATIVES –

Appearances:
- for the Appellant(s): **Mr H.J. Van Der Linde S.C.**
- for the Respondent(s): **Mr R.P. Quinn S.C. and Ms M.L. Beard**

Instructing attorneys:
- Appellant(s): **Netteltons Attorneys**
- Respondent(s): **McCallum Attorneys**

CASE INFORMATION -
- *Nature of proceedings* : **Exception**

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – GRAHAMSTOWN

Case No. 186/08
Date Heard: 19/2/09
Date Delivered: 2/4/09
Not Reportable

In the Matter Between:

BLUE CRANE ROUTE MUNICIPALITY **PLAINTIFF**

and

DARREN OWEN CLAASEN **FIRST DEFENDANT**
DAVY LOUW **SECOND DEFENDANT**
ADVOCATE SHAHEED PATEL **THIRD DEFENDANT**
GEORGE WILLIAM GOOSEN **FOURTH RESPONDENT**

In an exception taken by the third defendant to the plaintiff's particulars of claim, two issues arose. The first was whether the exception should be amended to include a prayer setting out the relief sought and the second was whether the particulars of claim were vague and embarrassing or lacked averments necessary to sustain a cause of action. As to the first issue, the amendment was granted as the plaintiff would suffer no prejudice and no injustice would result. As to the second issue, it was held that the particulars of claim were both vague and embarrassing and lacked averments necessary to sustain a cause of action because they did not contain averments required when instituting action in terms of the *condictio furtiva*. The exception was upheld with costs and the plaintiff was afforded 20 days within which to amend its particulars of claim.

JUDGMENT

PLASKET, J:

[1] The plaintiff issued summons against four persons for the recovery of a substantial amount of money. As against the third defendant – the excipient in this matter – it claims the amount of R300 000.00 based on the *condictio furtiva*. In this judgment, I shall refer to the parties as the municipality and Patel.

[2] The issue to be decided is whether as alleged in the notice of exception the municipality's particulars of claim, as they relate to Patel, are vague and embarrassing or lack averments necessary to sustain its cause of action. Before turning to a more detailed consideration of the notice of exception and the particulars of claim, it is necessary for me to furnish my reasons for allowing an amendment to the notice of exception and dismissing a point *in limine* raised by the municipality.

[A] THE AMENDMENT AND POINT *IN LIMINE*

[3] The amendment moved by Mr Van der Linde, who appeared for Patel, was for the insertion of a prayer into the notice of exception which would read:

> 'The third defendant accordingly prays that the exception be upheld with costs and that paragraph 10.1.4.2 (the second bullet), 15 (with reference to the third defendant), 15.3 and prayer 1.7 be struck out'.

[4] Mr Quinn who, with Ms Beard, appeared for the municipality raised a point *in limine* in which he sought the dismissal of the exception with costs on the basis that:

> '1. The third defendant's notice of exception of 10 November 2008 does not seek relief or conclude with a prayer and is bad in law.

2. The third defendant seeks, for the first time in its heads of argument filed on 11 February 2009, that paragraphs 6.3, 7, 10.1.4.2, 15.3 and prayer 1.7 of the plaintiff's particulars of claim be struck out.

2.1 The abovementioned relief was not anticipated by the plaintiff.

2.2 The plaintiff has been taken by surprise and will suffer prejudice.'

[5] It will be noticed that the point *in limine* is in reality the flip side of the application for the amendment. Accordingly, my decision to allow the amendment necessarily disposed of the point *in limine.*

[6] There is no doubt that an exception should include with a prayer in which the relief sought is set out.[1] This is not an express requirement of rule 23 which does require, however, that 'the grounds upon which the exception is founded shall be clearly and concisely stated'.[2] The requirement that an exception conclude with a prayer is a rule of practice and the absence of a prayer, being an irregularity, may be cured in the discretion of a court.[3]

[7] The position was set out thus by Henning J in *Vernon and others NNO v Bradley and others NNO*:[4]

'Accepting the position, as I am bound to do, that an exception which lacks a prayer is bad, I am in no doubt that the Court has the power to order an amendment to make good the defect, provided no prejudice or injustice is thereby caused to the respondent. The requirement of a prayer is not laid down by the Rules, and can only be a matter of practice. I can see no reason to believe that this rule of practice is imperative in the sense that non-compliance therewith renders an exception a nullity. The effect of three of the cases referred to above is to the contrary. It appears to me that the want of a prayer renders an

[1] *Pietermaritzburg City Council v Local Road Transportation Board, Pietermaritzburg* 1960 (1) SA 254 (N), 256D-F.
[2] Rule 23(3).
[3] *Soma v Morulane NO* 1975 (3) SA 53 (T), 55A-B.
[4] 1965 (1) SA 422 (N), 424A-B.

> exception an irregular or improper proceeding which can be attacked under Order XI, Rule 54. On that footing the Court has a discretion to cure the defect… .'

[8] The issue to be decided is whether the amendment will prejudice the municipality or cause injustice.

[9] The omission of a prayer in the exception was an obvious oversight. Despite that, the thrust of the exception is clear: it is that the allegations in the particulars of claim that Patel stole money from the municipality is defective for the reasons listed from (m) to (r) in the notice of exception. The municipality therefore knew what Patel's case was. It also knew what relief Patel intended to claim because the prayer that was sought was set out in paragraph 37 – the final paragraph – of his counsel's heads of argument. It would surely have deduced that an application for an amendment along those lines would be moved. Finally, the absence of the costs order was an obvious oversight which the municipality must have regarded as such.

[10] In these circumstances, I was of the view that to allow the amendment could not prejudice the municipality or cause injustice to it. I accordingly allowed the amendment and dismissed the point *in limine*.

[B] THE EXCEPTION

(1) The Pleadings

[11] In so far as they relate to Patel, the salient aspects of the particulars of claim are set out below.

[12] Patel is described as an advocate with expertise in municipal and labour law. It is alleged that he rendered professional services to the municipality in his fields of expertise (although this appears to be irrelevant for present purposes).

[13] It is alleged that during the period 2004 to 2006 the first and second defendants, both of whom were employees of the municipality, had purported to act on its behalf in concluding rental agreements in respect of office and related equipment. They did not follow lawful procurement procedure, did not act within their powers and were not authorised by the municipality.

[14] The municipality had paid what was due to the various financial entities with whom it had contracted through the purported agency of the first and second defendants. The equipment was supplied by a body called Consolidated Office Automation CC, trading as Pinnolta.

[15] When the financial entities were paid by the municipality they, in turn, paid Pinnolta the sum of R3 602 190,19. Pinnolta then made payments to the majority member of Pinnolta, to Patel and to the fourth defendant. It is alleged that Patel was paid R300 000,00 and that he then paid the first and second defendants the amounts of R28 000,00 and R11 000,00 respectively.

[16] The particulars of claim continue as follows:

> '11. In consequence of the aforegoing and during or about August 2007 the plaintiff cancelled the rental agreements.
>
> 12. In the premises;
>
> 12.1 the plaintiff has suffered damages in the sum of R3 849 774,30 paid by the plaintiff under the rental agreements;
>
> 12.2 the plaintiff was financially prejudiced in the sum R4 113 328,77 by reason of the facts and circumstances set forth at paragraph 10.1.3.
>
> 13. The said sums constitute unauthorised and/or irregular and/or fruitless and wasteful expenditure and the first defendant, alternatively the second defendant, alternatively the first and second defendants are liable to repay the plaintiff the total sum of R3 849 774,30.
>
> 14. Alternatively to paragraph 12 above, in breach of the first and second defendants' statutory and fiduciary duties, the first and

second defendants deliberately, alternatively negligently caused the plaintiff to suffer loss and damages in the total sum of R3 849 774,30.

15. In the further premises the first, second, third and fourth defendants stole alternatively misappropriated monies from the plaintiff and are liable to repay to the plaintiff;

15.1 the first defendant, the sum of R28 000,00

15.2 the second defendant, the sum of R11 000,00

15.3 the third defendant, the sum of R300 000,00

15.4 the fourth defendant, the sum of R392 750,00.'

[17] The particulars of claim then proceed to claim R3 849 774,30 from the first and second defendants and the amounts set out in paragraph 15 from each of the defendants.

[18] The crux of the exception, after setting out the chronology that I have summarised above, is this:

'(m) the plaintiff does not allege that the third defendant was aware that the said sum of R3 602 190,10 was paid to Pinnolta without justifiable cause;

(n) the plaintiff does not allege that it was the owner of the said sum of R300 000,00;

(o) the plaintiff has moreover not set out clear and concise statements of the material facts upon which it relies for its claim against the third defendant;

(p) the plaintiff does not allege that the third defendant procured payment of the said sum of R300 000,00 from the plaintiff and/or Pinnolta *animo furandi* and/or without justifiable cause;

(q) the plaintiff does not allege that the third defendant misappropriated the said sum of R300 000,00 *animo furandi*;

(r) the plaintiff does not allege that the third defendant was not entitled to payment of the said sum of R300 000,00.'

[19] The prayer that was added by way of the amendment then in effect sought to have every reference to Patel struck out.

(2) The Merits.

[20] Rule 18(4) of the Uniform Rules provides that '[e]very pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto'. Even though the rules do not state expressly that particulars of claim must disclose a cause of action it is more or less generally accepted that the rules do require this.[5] In order to plead his or her cause of action, a plaintiff must allege every fact that it must prove to support its claim.[6] In *Makgae v Sentraboer (Koöperatief) Bpk*[7] Ackermann J stated this proposition as follows:

> 'Word Reëls 17(2), 18(4), 20(2), en 23(1) saamgelees dan kom dit my voor dat 'n gedingvoerder, ten einde te verseker dat besonderhede van vordering nie eksipieërbaar is op grond daarvan dat dit "bewerings mi swat nodig is om die aksie te staaf" nie, moet toesien dat die wesenlike feite (dit wil sê die *facta probanda* en nie die *facta probantia* of getuienis te bewys van die *facta probanda* nie) van sy eis met voldoende duidelikheid en volledigheid uiteengesit word dat, indien die bestaan van sodanige feite aanvaar word, dit sy regskonklusie staaf en hom in regte sou moet laat slaag tav die regshulp of uitspraak wat hy aanvra.'

[21] The municipality's claim against Patel is based on the *condictio furtiva* – that Patel stole or misappropriated money from the municipality. Van Der Walt and Midgley say of it:[8]

> 'The *condictio furtiva* is recognised as an independent delictual action, in terms of which an owner, or anyone with an interest in a thing, may claim damages from a thief. Liability is strict, the reason being that a

[5] *Makgae v Sentraboer (Koöperatief) Bpk* 1981 (4) SA 239 (T), 244C.
[6] *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16, 23.
[7] Note 5, 245D-E.
[8] *Principles of Delict* (3 ed) Durban, LexisNexis Butterworths: 2005, para 34.

> defendant who wrongfully and intentionally deprives the plaintiff of possession of something, incurs the risk of that thing being lost through a cause not attributable to the defendant's fault. The *condictio* applies unchanged in its Roman-Dutch form. It is a requirement of the *condictio furtiva* that the plaintiff should still have sufficient interest in the thing at the time that action is instituted. … The requirement of theft on the part of the defendant does not necessarily imply theft in the criminal law sense – theft as perceived in Roman and Roman-Dutch law suffices to found liability. Once theft is proved, the plaintiff does not need to prove fault on the part of the defendant with regard to the damage caused to the stolen thing. An accomplice to the theft who at no time exercised control over the stolen thing is not liable under the *condictio furtiva*.'

[22] A plaintiff relying on the *condictio furtiva* must plead, and if he or she is to succeed, must prove, that: (a) he or she is the owner of the property in question or that he or she has a sufficient interest in it;[9] (b) the defendant wrongfully and intentionally deprived the plaintiff of possession of the property;[10] and that the defendant acted *animo furandi*.[11]

[23] It is also a requirement of the *condictio furtiva* that the defendant is the thief: it lies only against the thief (or his or her heirs) and not against a subsequent possessor, whether his or her possession is *bona fide* or *mala fide*, or against an accomplice.[12]

[24] In this case, the municipality pleaded that the conduct of the first and second defendants was unlawful in entering the contracts with the financial entities but, nonetheless, it paid them in terms of the contracts. Money was then paid by these entities to Pinnolta, which supplied the equipment, Pinnolta paid Patel and he paid the first and second defendants. It is pleaded that the

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[9] *Clifford v Farinha* 1988 94) SA 315 (W), 323H-324I.
[10] *Clifford v Farinha* (note 9), 321A-B.
[11] *First National Bank of Southern Africa Ltd v East Coast Design CC and others* 2000 (4) SA 137 (D), 145E-F; *John Bell and Co Ltd v Esselen* 1954 (1) SA 147 (A), 151E-G.
[12] *Minister van Verdediging v Van Wyk en andere* 1976 (1) SA 397 (T), 400E-F, 402A-G.

amount that the municipality paid to the financial entities was 'unauthorised and/or irregular and/or fruitless and wasteful expenditure' and this is the reason why the first and second defendants are liable to repay it. In the alternative, it is pleaded that they are liable to pay the amount because they acted in breach of their 'statutory and fiduciary duties' and did so either deliberately or negligently and thereby caused the municipality loss.

[25] The pleading then states that '[i]n the premises' all four of the defendants stole or misappropriated money from the municipality and that, *inter alia*, Patel was liable to pay it R300 000.00.The municipality does not allege that Patel was party to the conduct of the first and second defendants which amounted to the misappropriation. Nor does it allege that it was the owner of the R300 000.00 that Pinnolta paid to Patel or that it had some other sufficient interest in it. It also does not allege that Patel took the money *animo furandi*.

[26] I agree with Mr Van Der Linde that, when viewed holistically, the allegation that Patel stole or misappropriated R300 000.00 is 'meaningless having regard to the fact that it was paid to him by Pinnolta after Pinnolta was paid by [the financial entities] following on rental agreements which the first and second defendants purportedly entered into on behalf of the plaintiff with these entities without following lawful procurement procedures, by failing to act within the limits of applicable constitutional and statutory provisions and whilst not being authorised by the plaintiff'.[13]

[27] In the result, I find that the particulars of claim, insofar as they relate to Patel, are both vague and embarrassing, in that Patel would be prejudiced if he had to plead to them, and lack averments necessary to sustain the municipality's cause of action, in that they lack *facta probanda* to support the conclusion that is drawn that Patel stole or misappropriated R300 000.00 from the municpality.

[C] RELIEF

[13] I quote from paragraph 34 of Mr Van Der Linde's heads of argument.

[28] It will be apparent to the reader from what is set out above that the exception must succeed. Costs will follow the result. The municipality will, however, be afforded an opportunity to amend its particulars of claim to rectify the problems that have been identified in this judgment.

[29] The following order is made:

(a) The exception is upheld with costs.

(b) Paragraphs 10.1.4.2 (the second bullet), 15 (with reference to the third defendant) and 15.3 and prayer 1.7 of the particulars of claim are struck out.

(c) The plaintiff is afforded 20 days in which to amend its particulars of claim.

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C. PLASKET
JUDGE OF THE HIGH COURT

APPEARANCES:

For the excipient: Mr H.J. Van Der Linde S.C. instructed by Netteltons

For the respondent: Mr R.P. Quinn S.C. and Ms M.L. Beard instructed by McCallum Attorneys